

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

TIMOTHY R. ELDER, *et al.*,

Plaintiffs,

v.

Case No. JFM 10-CV-1418

NATIONAL CONFERENCE OF BAR
EXAMINERS,

Defendant.

MOTION FOR PRELIMINARY INJUNCTION and MOTION TO
DISMISS in the above matter, held on Thursday, July 13, 2010,
commencing at 2:17 p.m., before the HONORABLE J. FREDERICK MOTZ,
in the United States Courthouse, 101 West Lombard Street,
Baltimore, Maryland 21201.

APPEARANCES:

DANIEL FRANK GOLDSTEIN, Esq.,
MEHGAN SIDHU, Esq.,
SCOTT CHARLES LaBARRE, Esq.,
Appearing on behalf of the Plaintiffs;

ROBERT A. BURGOYNE, Esq.,
Appearing on behalf of the Defendant;

MAZEN M. BASRAWI, Esq.,
Appearing on behalf of the U.S. Assistant
Attorney General, Civil Rights Division.

Reported by:

Julie A. Wycoff, RPR
Official U.S. Court Reporter

1 (Proceedings commenced at 2:17 p.m.)

2 DEPUTY CLERK: This Court resumes in session. The
3 Honorable J. Frederick Motz presiding.

4 THE COURT: Motion for Preliminary Injunction in the
5 case of Elder versus National Conference of Bar Examiners, JFM
6 10-1418.

7 You all may be seated.

8 Counsel, identify yourselves for the record.

9 MR. GOLDSTEIN: Good morning, Your Honor. Daniel
10 Goldstein of Brown Goldstein Levy on behalf of the plaintiffs.

11 With me today is Meghan Sidhu, also of Brown Goldstein
12 Levy; Scott LaBarre of the LaBarre Law Firm, he is admitted pro
13 hac vice; next to him is Michael Witwer, one of plaintiffs; and
14 next to him, Tim Elder, another one of the plaintiffs.

15 Anne Blackfield, who is another plaintiff had
16 emergency eye surgery and could not make it today and so is not
17 in the courtroom.

18 And Scott Curtis who's the assistant attorney general
19 for the Maryland Bar of Law Examiners asked me to tell you he's
20 in the courtroom if the Court had any questions for him, and
21 he's at the back.

22 THE COURT: All right.

23 MR. BURGOWNE: Good afternoon, Your Honor. Robert
24 Burgoyne of Fulbright and Jaworski, appearing on behalf of the
25 National Conference of Bar Examiners.

1 MR. BASRAWI: Good afternoon, Your Honor. Mazen
2 Basrawi, counsel for the Assistant Attorney General for the
3 Civil Rights Division, on behalf of the United States.

4 THE COURT: Thank you.

5 All right. We have obviously two motions, but it
6 seems to me, the motion to dismiss can get -- for the issues can
7 be discussed in the context of the motion for preliminary
8 injunction. So why don't I have the plaintiffs go first. Tell
9 me why I should grant a preliminary injunction.

10 MR. GOLDSTEIN: Thank you, Your Honor.

11 THE COURT: Belinda, you're free to --

12 Does anybody have any exhibits or anything? This is
13 all legal argument, isn't it?

14 MR. GOLDSTEIN: Well, we had mentioned, Your Honor,
15 that we ask want to demonstrate for the Court --

16 THE COURT: I don't think I need to see that. Then
17 I'd have to hear a reader and all kinds of things, so I don't
18 think I need that.

19 Belinda, you're free to stay, you're free to go.

20 MR. GOLDSTEIN: May I make a proffer with respect to
21 what this demonstration --

22 THE COURT: Of course.

23 MR. GOLDSTEIN: -- would involve?

24 Your Honor, what the demonstration of JAWS, which is
25 the screen-access software that Mr. Elder uses, would reflect is

1 that he can, as he goes through a question, navigate within the
2 question. He can set a default speed beforehand that's
3 considerably faster than most human speakers can speak
4 intelligibly. He can set it so that, for example, if something
5 is in quotation marks, it is read in a different voice to signal
6 to him that that language is in quotation marks.

7 He can choose to have exclamation points actually
8 verbalized so that if something is an a excited utterance, he's
9 going to know it because he has preset the JAWS software to give
10 him that punctuation mark. He could choose also, for example,
11 as a contextual matter, to have it vocalize open and close
12 parentheses. But given that each of the answers are in
13 parentheses, he might choose to change that setting as he goes
14 forward.

15 He can have it set so that it will pause where there
16 are commas and pause where there are paragraphs. And, of
17 course, he can instantly choose to navigate not only word by
18 word, but letter by letter if, for example, there were a Latin
19 phrase or something whose pronunciation was not familiar to him,
20 to enable him to know immediately what he was hearing. And so
21 it's quite an agile software.

22 With respect to Mr. Witwer, he's a ZoomText user.
23 What you would have seen with ZoomText is that the cursor is a
24 large yellow cursor, perhaps an inch and a half in size.

25 THE COURT: Excuse me, this is probably -- do you want

1 to sit in the back? You can come around.

2 MR. GOLDSTEIN: Perhaps an inch and a half in size,
3 and there is a bright red horizontal line and a bright red
4 vertical line. And as the text is vocalized, that moves. So it
5 allows someone with residual vision who, like Mr. Witwer, is not
6 actually reading visually, but needs it to orient and navigate
7 to be able to see where the location of cursor is at all times.

8 It is also has the same -- not the same, but
9 similar -- text-to-speech software to that in JAWS so that he is
10 principally taking in the information in a oral fashion but it's
11 supplemented by the fact that he can orient himself. It makes
12 it easier to go to Question 2 or to toggle back and forth
13 between Choices B and C, and so on, because as his affidavit
14 establishes, he is a visual learner.

15 The other thing I think you would have seen with this
16 demonstration but may be familiar to you if you've used Word, is
17 that the saving of a file that's contained on a thumb drive or a
18 CD cannot be inadvertently done. And anybody who was proctoring
19 the exam or watching the screen would see the same thing you and
20 I see when we try to save a file, which is that we're asked if
21 we -- we have to do -- first take the step of asking to save a
22 file, and then we're given a choice about where to locate it,
23 and then we have to select that. It's a four- or five-level
24 step.

25 So this is what we believe you would have seen had we

1 made that demonstration.

2 THE COURT: Very effective proffer, thank you.

3 MR. GOLDSTEIN: Turning to the -- this case, what it
4 is about, as you know, from our perspective is ensuring that the
5 plaintiffs are afforded an equal opportunity to compete in
6 securing the requirements to pursue their chosen profession, a
7 rights that's guaranteed by federal law. Not being able to see
8 is a nuisance, Your Honor; not being able to compete on a equal
9 basis is a handicapped, and that's the handicap we seek to
10 overcome.

11 In its motion to dismiss or for summary judgment, NCBE
12 asserts that this Court has no jurisdiction to rule on the
13 assertion of a deprivation of a federally guaranteed civil
14 right, even where -- as here -- there is no adverse state ruling
15 of the kind that could raise a jurisdictional barrier.

16 It also asserts that it doesn't offer this exam,
17 though it develops it, disseminates it, controls the format, and
18 controls the circumstances under which the examination is
19 offered. It makes that argument, I submit, by reading language
20 into the statute; that is to say, language that it must offer it
21 directly to an examinee, that is simply not there and would make
22 the statute at odds with the congressional intent to fill the
23 gap after Title II and 504 already applied to licensing exams
24 given by the State and by other governmental entities.

25 It also asserts that just as a book store need not

1 alter its inventory to provide Braille books, so, too, it need
2 not alter it's pencil-and-paper test to provide an accessible
3 version, be that Braille or electronic. Despite the fact that
4 there's a specific regulatory command that requires it to do
5 just that, a command that does not apply to or find any parallel
6 for book stores or other places of public accommodation.

7 In doing so, it makes repeated references to Title III
8 cases that have no application to testing agencies, and we've
9 cited to Your Honor *Doe* and *Breimhorst* that make it very clear
10 that when plaintiffs want to use other parts of Title III for
11 other testing entities, they may not, and the same is true for
12 the defense. And for good reason.

13 If I can just give an example, *Dobard* is cited by
14 defense counsel, the *BART* case, where the Court said, you know,
15 if you pick an effective accommodation, the fact that it may not
16 work for this particular plaintiff doesn't alter the fact that
17 *BART* has made -- met its obligations under Title II.

18 Well, under that way of thinking, what the NCBE could
19 do is offer only a Braille test, and the fact that only
20 10 percent of the blind population today reads Braille would
21 just be too bad for that other 90 percent.

22 In fact, what the law commands -- and I say this
23 regardless of whether you look at the regulation as we believe
24 you should or a reasonable accommodation as the NCBE asserts,
25 what the law commands is an equal opportunity to compete.

1 And what the record here shows, very powerfully, I
2 submit, is the following: You know from the affidavits of
3 Mr. Witwer, Mr. Elder, and Ms. Blackfield that their primary
4 reading method is the use of screen-access software. It's the
5 way they succeeded academically. It's the way they've learned
6 their legal materials. That's the -- that this is their
7 primarily reading method is not in dispute.

8 You have three uncontroverted medical experts --
9 excuse me, three uncontroverted experts. Dr. Malkin from the
10 Wilmer clinic, who's explained not only why screen-access
11 software allows Mr. Witwer to compete on an equal basis, but she
12 also explains why the alternatives offered by the NCBE, the
13 alternative accommodations, are inferior and would not allow
14 competition on an equal basis. That testimony is not
15 contradicted in this record.

16 Similarly, Mr. Smith, the vocational rehabilitation
17 specialist who's worked for many years for the Department of
18 Rehabilitative Services has explained why for Ms. Blackfield the
19 use of JAWS is, indeed, the only thing that puts her on an equal
20 footing and gives her an equal opportunity to compete. And he,
21 too, explain why the other alternatives are inferior.

22 And finally, Dr. Stimson, on a behalf of Mr. Elder,
23 establishes the same thing. Dr. Stimson's affidavit is
24 particularly helpful, because as a cognitive psychologist with a
25 doctorate in -- sorry, someone with a doctorate in cognitive

1 psychology, he explains the reading process and how while we
2 think we read linearly, in fact, we constantly, and without
3 thinking about it, move back and forth within the text, speeding
4 up and slowing down, and how the screen-access software
5 essentially allows the same thing to be done orally that we do
6 visually.

7 All of that testimony is uncontradicted, as is the
8 testimony of Dr. Schroeder, who explains that one's primary
9 reading method is the one that allows someone to focus on
10 content and not the process of reading, and that's critical. If
11 you're going to focus on the test itself, you can't be stopping
12 to think about how you're taking the content in or taking it in
13 in an unfamiliar manner or method.

14 And finally, Dr. Schroeder explains that today
15 screen-access software has become common and that it is
16 recognized by schools and by employers as a reasonable
17 accommodation.

18 None of that is disputed.

19 The NCBE does suggest that the plaintiffs are simply
20 asking for their preferred accommodation. If that is what our
21 pleadings appear to say, then I have not done a very good job of
22 expressing the plaintiffs' point of view. We don't seek any
23 kind of preferential treatment. We don't seek a preferred
24 accommodation. We seek an appropriate accommodation that will
25 allow the plaintiffs to be tested so that the test results will

1 reflect their skills and their knowledge and their capabilities
2 and not their disabilities, and that's what we're seeking.

3 The NCBE has not offered any evidence that the
4 accommodations it offers would provide a quality of
5 opportunities to these plaintiffs, provide an opportunity to
6 compete with their sighted peers on equal basis. I have not
7 seen any claim in their papers that the accommodations they
8 proposed to offer do so.

9 Rather, they make the argument that if they offer
10 certain accommodations that may convey materially -- material
11 nonvisually, then that suffices, whether it is the suitable
12 accommodation or not. We believe that -- and I'll turn in a
13 second to which standard -- that under any standard the Court
14 might apply that this makes it likely that we will prevail on
15 the merits of our claim.

16 The standard that is urged by the NCBE is that of
17 reasonable accommodations. I'm not going to repeat what I've
18 put in our pleadings, but I think what is critical to understand
19 is that while that standard is not in the statute and not in the
20 regulations, that what it has in common with the standard is
21 what this Court said in the *Talbot* case, which is that a
22 reasonable accommodation is an accommodation that provides a
23 quality of opportunity.

24 What the Court said there was: "Accordingly, the
25 reasonable-accommodation question asks whether the

1 accommodation, one, would be effective -- that is, would it
2 address job-related difficulties presented by the employee's
3 disability -- I'm skipping the cite -- and, two, allow the
4 employee to attain an equal level of achievement, opportunity,
5 and participation that a nondisabled individual in the same
6 position would be able to achieve.

7 That language --

8 THE COURT: I think she went on to say you don't have
9 to use the best method, but I could be wrong.

10 MR. GOLDSTEIN: What she went on to say was that it's
11 the employer's choice, but I would submit to you that the
12 difference between an employment situation and this is the
13 employee -- it's a long-term situation where the employer has
14 many tools.

15 It can -- I don't know how you talk about the best or
16 not the best if the choices are, well, we could change the job
17 duties, we could transfer, we could provide some software that
18 might solve the problem.

19 When you have that -- and it's a symbiotic
20 relationship. You've got the employer's interest and the
21 employee's interest at work that need to work out over the long
22 term. And it makes a lot of sense to talk about that in that
23 context, about what an employer can do and so the employer's
24 hands aren't tied. And that may be why the word "reasonable
25 accommodation" and the whole interactive process that's

1 described in Reasonable Accommodation is Title I and it's not in
2 Title III.

3 So I think -- I think you're right, Your Honor, that
4 there is a difference here. And in any event, we're looking at
5 a statute that -- rather, a regulation that does talk about
6 "best ensure" and that is parallel to the Title I requirement
7 that's in the statute for "most effective," and that is in the
8 504 regulation, essentially follows this same language.

9 So the -- there has been no claim at any time by the
10 NCBE that anything they offer would best ensure that the results
11 for these plaintiffs would reflect their abilities rather than
12 their disabilities. And so if you apply the regulatory
13 standard, it's very clear that we succeed.

14 The argument is offered that this regulation is
15 somehow defective and an overreach under *Sandoval* and *Harris*,
16 and that argument is both wrong and proves too much. We cited
17 to the Court the Supreme Court decision in *Morton*.

18 *Morton* makes very clear that when there is language,
19 as there was in *Morton*, that was ambiguous in the statute -- and
20 the meaning of "accessible" in 12189 is not altogether
21 apparent -- then the regulations can't be contrary to the terms
22 of the statute. And as long as it is not arbitrary -- and
23 clearly there is sound reasons why the Department of Justice
24 could have used the language it did and so long as the
25 regulation furthers congressional intent -- then it is valid,

1 and the Court must defer to the meaning of the regulation as
2 interpreted by the implementing authority.

3 THE COURT: I'm sorry, repeat for me again your
4 argument of why the statutory language is ambivalent or unclear.

5 MR. GOLDSTEIN: Yes, Your Honor, if I can just -- let
6 me get the case.

7 In *United States v. Morton* -- sorry, there are so
8 many -- we've thrown so much paper at you, Your Honor, that I've
9 got a lot of cases in this notebook --

10 THE COURT: That's fine.

11 MR. GOLDSTEIN: -- I just need to get to it.

12 In *United States v. Morton*, the statute and
13 regulations dealt with the immunity of suit that some members of
14 armed services received from certain kinds of garnishments and
15 cases of that sort.

16 And in interpreting and giving conclusive effect to
17 the regulation for the implementation, what the Court said at
18 467 U.S. 834 was "because Congress explicitly delegated
19 authority to construe the statute by regulation" -- which is the
20 situation with the ADA -- "in this case, we must give the
21 regulations legislative and, hence, controlling weight, unless
22 they are arbitrary, capricious, or plain contrary to the
23 statute.

24 So the Court then looked at the -- those three
25 standards and said "the regulations" -- and this is at 835 to

1 836 -- "cannot possibly be considered clearly and consistent
2 with the statute or arbitrary, since the terms "legal process"
3 and "court of competent jurisdiction" are, at least, ambiguous.

4 In other words, what the Court said is since the
5 statute isn't completely clear of what is or isn't a court of
6 competent jurisdiction and since the statute doesn't define what
7 was meant there by "legal process," it was appropriate for the
8 regulations to define those terms.

9 And it went on to say that the regulation furthered
10 the congressional intent of facilitating the speedy enforcement
11 of garnishment orders and, therefore, because it, on the one
12 hand, addressed things that weren't clear from the statute alone
13 and, second, furthered the intent, the regulations were valid.

14 And we've cited to the Court a number of cases that
15 have said with respect to the ADA that Congress began with a
16 very broad brush and then left it to the DOJ, in the case of
17 Title II and Title III; EEOC, in the case of Title I --

18 THE COURT: What is the statutory language that the
19 regulation is trying to interpret?

20 MR. GOLDSTEIN: The statutory regulation --

21 THE COURT: Statutory language.

22 MR. GOLDSTEIN: I'm sorry.

23 Statutory language is 12189. 12189 says that any
24 person that offers examinations or courses related to
25 applications, licensing, certification, or credentialing for

1 secondary or post-secondary education, professional trade
2 purposes, shall offer such examinations or courses in a place or
3 manner accessible to persons with disabilities or offer
4 alternative accessible arrangements for such individuals.

5 THE COURT: The key word is "accessible," which you
6 say is ambiguous.

7 MR. GOLDSTEIN: Yes, it is, Your Honor.

8 For example, just to give you another example, if you
9 look at the operative language of Title II, which is designed to
10 give equal access to programs that are operated by the State,
11 121 -- Section 12132 of Title 42, you'll note that -- trying to
12 page through it here -- you'll note that it says nothing about
13 any kind of equal access.

14 It says: "Subject to the provisions of the
15 subchapter, no qualified individual with a disability shall, by
16 reason of such disability, be excluded from participation in or
17 be denied the benefits of the services, programs, or activities
18 of a public entity."

19 So if you look at that language, then theoretically,
20 as long as Mr. Lang could crawl to the second floor of the
21 Tennessee courthouse, there was no violation of Title II because
22 he wasn't being excluded. But the regulations that exist
23 pursuant to Title II make it very clear that equal access is
24 what it's all about, and we have cited to you the very clear
25 congressional language, indeed the findings that are in the

1 statute, as to the purpose of the statute that it's to provide
2 equal access.

3 And so I submit to you that it's not contrary to the
4 terms of the statute; it's not outside the scope of the statute
5 to talk here about equal access -- or rather to talk -- those
6 aren't the terms, to talk, as the regulation does, about having
7 the results reflect a person's abilities and not their
8 disabilities. And I ask you to consider the contrary: Could
9 you say that an exam was accessible if the results largely
10 reflected a person's sensory impairment? In what sense would
11 that be so? I don't think that's at all clear.

12 So I suggest that this regulation is valid, and I
13 further suggest that the passing reference to *Harris* and
14 *Sandoval* that we see falls far short of a serious challenge to
15 the regulations.

16 THE COURT: This might sound like a very cold
17 question, but what about the issue of overcompensation? If the
18 computer software is that good, shouldn't the authorities -- or
19 shouldn't there be something in the record to reflect whether
20 double time or time and a half is appropriate, or maybe
21 something less than that is appropriate?

22 MR. GOLDSTEIN: It's not a cold --

23 THE COURT: In other words, you get overcompensation
24 and actually the plaintiffs would benefit.

25 MR. GOLDSTEIN: It's absolutely not a cold question.

1 It's a very appropriate question. It's one in which the NCBE
2 chose not to make a record.

3 THE COURT: But you didn't either, and you're making
4 the motion.

5 MR. GOLDSTEIN: Well, yes, except than the NCBE has
6 made clear they're prepared to provide the additional time. Had
7 they said if screen-access software is not granted, we don't
8 think it's appropriate to provide the additional time, then we
9 would have been delighted to put that in the record, but we
10 didn't understand and do not understand it to be in dispute.

11 The process what's called -- I always have trouble
12 pronouncing this -- saccading, the movement of the eye, is, I
13 believe, the fastest human movement there is. And we are not
14 seeking to get any more advantage than anyone else. And if
15 it -- less time were appropriate, given the reading speed using
16 the software of these plaintiffs, then we'd be happy to do so.

17 But I believe that -- in fact, I'm certain of it --
18 that what we do have in the record, Your Honor, is the
19 accommodation requests include statements by physicians that
20 cover not only the screen-access software, but the amount of
21 time that would be appropriate to put these plaintiffs on an
22 equal footing using the -- that screen-access software.

23 And perhaps Ms. Sidhu can find the record cites for
24 that while I address other questions from the Court or other
25 matters in this argument.

1 THE COURT: Well, one of the decisions from the
2 Maryland Board of Examiners about that, because it granted the
3 time and said we can't provide the software.

4 MR. GOLDSTEIN: Correct. Well, they have the
5 software; they just can't provide the exam in electronic format.

6 THE COURT: Can't provide -- that's true.

7 MR. GOLDSTEIN: And that's a segue, actually, on the
8 question of subject matter jurisdiction which, perhaps, I should
9 turn to next.

10 Ordinarily under Sections 1331 and 1343(4), this Court
11 has jurisdiction over civil rights claims where the claim is one
12 guaranteed by a federal statute. There are exceptions under a
13 variety of abstention doctrines, and the NCBE has carefully
14 stayed away from discussing any of those abstention doctrines.
15 But the one that applies here, if it were to apply it at all,
16 would be *Rooker-Feldman*.

17 THE COURT: Actually, you can -- I'll hear from -- the
18 same would apply with Mr. Burgoyne's issue. It seems to me that
19 that court of appeal's decision has to do with relative --
20 allocating relative responsibilities between the court of
21 appeals and circuit court, and it's got nothing to do with the
22 federal court. I find it very hard to believe that a federal
23 court can't enforce a federal right if it was being violated,
24 but I'll -- you can say something about how that will apply.

25 MR. GOLDSTEIN: I will follow Rule 2, then, and pass

1 on then to another issue, Your Honor.

2 Another argument that's offered here is that NCBE does
3 not offer the examination.

4 THE COURT: Which, again, is a very cold issue, but
5 you better tell me why Mr. Burgoyne is not right on this one,
6 because I don't see them offering a darn thing, except to the
7 Maryland Board of Examiners. I don't see them offering
8 anything. If Congress made a mistake, Congress made a mistake,
9 and their argument can be made.

10 MR. GOLDSTEIN: Well, Your Honor, if you look at
11 12189, I'm looking for that "to" language you're talking about.
12 It doesn't say "offer to" examinees. It doesn't say "offer to"
13 applicants. It doesn't say "offer to" -- there's is no privity
14 statement in 12189. We're not dealing --

15 THE COURT: But the person has to be controlling the
16 selecting and making it in a place and manner accessible to
17 persons with disabilities.

18 What does the defendant here have to do with
19 placement? Why did you sue him? Along with a number of
20 concerns, sue the licensing authority. And if they want a third
21 party in, the Board, they'll do it.

22 MR. GOLDSTEIN: Well, we could not sue -- first of
23 all, I think --

24 THE COURT: You probably couldn't --

25 MR. GOLDSTEIN: Well --

1 THE COURT: -- injecting issues into the case.

2 MR. GOLDSTEIN: And the most obvious of which, we had
3 no adverse decision from the State Board of Law Examiners.
4 There was no -- there was no argument on their part that they --
5 this was not an appropriate accommodation.

6 THE COURT: If they're the ones offering the exam
7 within the meaning of the statute, then they're the appropriate
8 party.

9 MR. GOLDSTEIN: Well, first of all, Your Honor, you
10 say if they're "the" party offering the exam. And I am not
11 clear where you're finding that only one party can offer an
12 exam. That's not at all clear to me that that's --

13 THE COURT: They are "a" party.

14 MR. GOLDSTEIN: Yes, they are "a" party, and they --

15 THE COURT: And according to Mr. Burgoyne, they are
16 "the" party.

17 MR. GOLDSTEIN: I'm sorry?

18 THE COURT: And if the defendant is right, they are
19 "the" party.

20 MR. GOLDSTEIN: If the defendant is right, but what
21 the defendant has done is to show that the bar administers the
22 exam. Administers the exam. And if you go to Webster's and
23 you -- or to Roget's -- and you look for synonyms to "offer,"
24 you will not find "administer" as a synonym, because it's not.

25 I suggest, with all respect, that you're using "offer"

1 in a metaphorical sense.

2 THE COURT: No. Forget offer, what about the statute:
3 Applies to any person offering examinations -- ellipsis
4 points -- that offerers shall offer such examinations in a place
5 and manner accessible to persons with disabilities.

6 What authority did the defendant have to select the
7 place?

8 MR. GOLDSTEIN: The NCBE he has every right to
9 condition, saying if you want to use the MBE, you have to give
10 it in an accessible place.

11 Where is it read that the NCBE cannot impose that
12 condition, Your Honor? Of course it can. Just the way it
13 imposes conditions on security, just the way it imposes
14 conditions on the manner in which it is offered.

15 So if it can impose restrictions on the manner in
16 which it's offered, and we're here because it has, then what
17 would keep it from saying either way: You have to offer it in a
18 five-story building with no elevator and 16 steps in the front,
19 or you have to offer it in a place that's accessible, or we're
20 not going to send you the exam.

21 I mean, you have to understand the practical aspects
22 of this. If the -- excuse me. If the NCBE -- excuse me if the
23 Maryland Board of Law Examiners wanted to, they could, without
24 violating copyright, make an electronic copy of this exam.
25 That's a classic definition of Fair Use. There is only one

1 problem; which is, they'd never be able to offer the multistate
2 again. The power relationship here is very, very clear. The
3 NCBE controls the circumstances under which it allows state bars
4 to do so.

5 And we've given you Exhibit A, is the supervisor's
6 manual from the National Conference of Bar Examiners, and it
7 gives, step by step, all of the things that it requires in the
8 manner in which the exam is given as to the scheduling of it;
9 the use, selection, and responsibility of proctors; the seating
10 arrangements; the receipt of materials; the distribution and
11 post-distribution requirements.

12 You know, the National Board of Law Examiners has an
13 independent duty under Title II as to the place where it's
14 given. I mean, I suggest to you a highly theoretical issue in
15 that regard, but there can be no question after you read this
16 manual who has the true control. And, again, that's -- that's
17 why we're here.

18 There is no -- in the definition of -- rather, in the
19 use of the word "offer," there's been no definition offered by
20 NCBE, other than: Whatever it is that we're doing, it's not
21 offering. And you have to consider this against the landscape
22 that, whether it's optometry or surveyors or engineers or
23 veterinary medicine, it is the case now -- it was the case when
24 the ADA was passed -- that there are national organizations that
25 devise tests for national standards they use --

1 THE COURT: But they can give them now for anywhere
2 from graduate record exams, the law boards, even the medical
3 examinations. I understand it is different. And they actually
4 are offering -- and even the professional responsibility exam --
5 they all are offered by the test maker.

6 MR. GOLDSTEIN: Well, the -- I think that's true with
7 respect to the MPRE. I don't think that's necessarily -- and
8 with the GRE, of course, that's not a state licensing exam at
9 all.

10 But to say when they have the degree of control that
11 they do, that that doesn't constitute offering, I suggest, Your
12 Honor, requires really reading in (A) "to whom it's offered,"
13 because it certainly is offered to the Maryland bar; it means
14 reading in that it can't be offered indirectly; it means reading
15 in that there can't be more than one person offering. And none
16 of that is consistent, I suggest to you, with the broad reading
17 that you're to give the Americans with Disabilities Act.

18 Let me turn, if I might, to the four factors that the
19 NCBE claims are determinative of this case.

20 THE COURT: Do you disagree?

21 MR. GOLDSTEIN: Oh, I'm not talking about the four
22 factors for preliminary injunction.

23 THE COURT: Oh, okay, excuse me.

24 MR. GOLDSTEIN: No, no. I don't -- that scenario,
25 we're all on board. *Winter is Winter.*

1 No, page 3 of their opening memo -- and they repeat
2 this in their reply they filed yesterday -- they say there are
3 four factors that resolve the overarching legal issue. The
4 first is they say they offer the appropriate auxillary aids and
5 services that are listed in the regulation and, therefore, are
6 required to do nothing more.

7 The problem with that argument is the list is
8 explicitly nonexclusive. And as Judge Breyer explained in his
9 second *Enyart* opinion, the regulation, after listing some
10 auxillary aids, goes on to say "or other effective methods of
11 making visually delivered materials available."

12 What is the function of that language if it's not
13 meant to indicate that just doing what's on the list may not
14 suffice in the provision of appropriate aids?

15 That language clearly informs the testing agency that
16 the listed regulations are not exclusive. And NCBE has failed
17 to show that screen-access software is not -- to use that
18 language from the regulation -- "an effective method of making
19 visually developed materials available."

20 Let me just -- the mention of *Enyart* reminds me, going
21 back for a minute to the claim that the -- NCBE doesn't offer
22 this exam.

23 They have said that the reason they didn't say
24 anything about that in the *Enyart* case was the MPRE case was
25 also there. That, I suggest, is a non sequitur, because if they

1 didn't have to provide the NBE in accessible format because they
2 don't offer it, then that surely would have been a significant
3 win. Then they would have only had to deal with the MPRE,
4 and --

5 THE COURT: So that they're judicially estopped
6 from -- what flows from that? Suppose they made a mistake and
7 didn't raise the issue. So what?

8 MR. GOLDSTEIN: I think the -- I think that's a fair
9 rejoinder, Your Honor.

10 THE COURT: It's not a rejoinder. It's --

11 MR. GOLDSTEIN: But I believe it's a fair question at
12 the moment, I'm sure, that tonight I'll realize.

13 THE COURT: No, no. They're making a tacit admission
14 that they obviously consider themselves an offerer.

15 MR. GOLDSTEIN: But it does seem rather surprising
16 to see this raised so late --

17 THE COURT: It does. I understand.

18 MR. GOLDSTEIN: The -- but we haven't raised the
19 factor of judicial estoppel, and I think whatever limit the
20 number of issues are that can be raised in a single case, we're
21 probably close to the limit.

22 The second factor before that they've talked about is
23 that that the menu of accommodations it offers has been twice
24 approved by the DOJ in settlements. And I have to say for the
25 life of me, I don't understand that argument on several grounds.

1 First of all, the first settlement in Doug Elliott's
2 case involving his complaint that he couldn't -- that his reader
3 wasn't qualified, the social work exam, it's over a decade ago,
4 long before the technological changes we've all come to see take
5 place. But nothing about that settlement implied anything, one
6 way or the other, about screen-access software. What prompted
7 that settlement was the fact that the reader wasn't qualified,
8 and the complainant was insisting on some qualifications for
9 readers, which, by the way, don't exist.

10 THE COURT: All this really means to me -- and,
11 Mr. Burgoyne, but really is to ask you -- you're absolutely
12 right about the language in the statute. It's not inclusive.
13 The settlements, at least one of them, is, you know --
14 questions. But the fact of the matter is you have a history of
15 what has been deemed to be an entirely reasonable accommodation.
16 You are here asking for extraordinary relief on a record which
17 has not yet been fully developed.

18 I frankly don't know yet. I mean, I certainly
19 understand the hardships of not passing the bar examination, you
20 know, the humiliations, concern of that, having to restudy. But
21 I don't know whether your client is going to pass it or not, so
22 in terms of balancing equities, there's a problem.

23 But the relevance of the history is that there is a
24 demonstrated background that this is a good way to approach the
25 issue, whether you characterize what your clients want as their

1 preferred way or not, you are, in effect, giving to your clients
2 the ability to choose which way they're taking the test.

3 I will certainly ask Mr. Burgoyne. There must be good
4 reasons why they're resistant to this. Some may be the security
5 concerns which really aren't fully briefed yet; there may be
6 concerns about -- you know, we just don't know enough yet to
7 know about -- in fact, I'm going to ask him about the test, why
8 for the test they didn't adopt it.

9 But they have concerns. And to say, wait a minute,
10 let's not do this now, we have a perfectly clear history of --
11 even though it's not inclusive, we have the statute saying this
12 is adequate, we have settlements which say this is adequate, we
13 have a history that thing -- short of what the plaintiffs are
14 asking for -- is adequate.

15 Don't -- Judge, go ahead and issue an extraordinary
16 remedy. Particularly, we don't know if the case is going to be
17 ripe because we don't know if the plaintiffs were going to fail
18 the board examination.

19 Just leave it alone, let the record be developed, and
20 make your decision. Then that -- and there are issues that
21 maybe you're not going to win, either because of the outcome
22 of -- after discovery or because they don't offer the exam.

23 So there's a lot to be said for just, you know -- you
24 could very well be right, but let it be decided in due course
25 rather than under an extraordinary remedy.

1 MR. GOLDSTEIN: Well, I think the problem with that
2 approach is severalfold.

3 First of all, you said they must have good reasons not
4 to want to do this. I thought the function of briefing, the
5 function of pleading, the function of submitting evidence into a
6 record was to do just that. And the regulation says that you
7 must offer an appropriate accommodation unless it is unduly
8 burdensome or would fundamentally alter the nature of the test.

9 THE COURT: They're not briefing the issue of unduly
10 burdensome.

11 MR. GOLDSTEIN: Nor do they claim this is not a Palmer
12 Writing Method test. They don't -- although they keep
13 mentioning it's a paper-and-pencil test, they have not briefed
14 either one of the affirmative defenses. So the only question
15 becomes is it an appropriate accommodation.

16 And there have been noises about the security issues,
17 so we thought that --

18 THE COURT: The real question is whether -- if they
19 offer it, whether or not it's accessible to your clients. It's
20 not appropriate examination; it's -- within the statutory
21 language, is it accessible.

22 Now, the regulation says it's got to be the best way
23 to ensure that, and that's a legal issue.

24 MR. GOLDSTEIN: Well, or a reasonable accommodation
25 has to provide equal opportunity. And what we have shown and

1 they have not shown and the record is entirely 100 percent
2 one-sided on this --

3 THE COURT: No, it's not. You've got -- that's why I
4 raised in the context of the history of what they're offering:
5 more time, the reader, everything else. There's a history that
6 this is perfectly all right.

7 MR. GOLDSTEIN: If that is the case, Your Honor, and
8 they don't have to offer what best ensures but merely have to
9 offer reasonable accommodation -- it doesn't have to be equal
10 opportunity but can be a menu -- then they can offer just
11 Braille, or just Braille and large print.

12 THE COURT: No, they can't.

13 MR. GOLDSTEIN: Well --

14 THE COURT: They wouldn't then be able to rely on the
15 history of the various things that they offer. I mean -- and
16 they're not taking that position.

17 MR. GOLDSTEIN: Your Honor.

18 THE COURT: In fact, they couldn't offer just Braille
19 because the record reflects that a lot of people don't know
20 Braille, including your clients, I think, but --

21 MR. GOLDSTEIN: That's -- that is correct, but you've
22 got to make this work with some legal standard. And it doesn't
23 work with the reasonable accommodation legal standard because
24 you've got nothing in this record to show that a reader provides
25 equal access, and you have a substantial --

1 THE COURT: You have a demonstrated history. That's
2 the point. You have a long history that this is exactly what
3 is -- now, there may be people who say you need more, and they
4 may very well be right, but it's crazy not to take into account
5 another kind of computer program.

6 And this case may very well be a mechanism for proving
7 that, but you had a long established record of what is offered
8 by the defendant has been deemed and presumably should be
9 considered entirely reasonable, and leave it for the litigation
10 to determine whether it's the best or not.

11 MR. GOLDSTEIN: Your Honor, I wouldn't dispute, for
12 example, that there's a long history that large print is an
13 effective accommodation. Not at all. But for whom?

14 The one thing I know this Court has said before over
15 and over again is that the question of what's a reasonable
16 accommodation is an individualized inquiry. An individualized
17 inquiry.

18 You do not have in this record that these
19 accommodations are suitable for all blind people. That's not in
20 any of settlements. That's not in any NFB resolution. You have
21 no record here, Your Honor, no record here, that these -- this
22 preset menu of accommodations is suitable for all blind people.
23 Just not there.

24 Now, let me turn briefly to this question of
25 irreparable injury, if I might.

1 You have not only the two *Enyard* opinions, *D'Amico*,
2 *Agranoff*, and *Chalk* in the Ninth Circuit, but you have *Jones*
3 that makes it very clear that justice delayed is justice denied.

4 If these plaintiffs have to wait in order to be
5 entitled not to be burdened by discrimination in taking this
6 examination, that's by no means a self-inflicted wound any more
7 than if you said, look, I'm sorry about the steps, but he's just
8 going to have to crawl up, maybe they can give him a wheelchair
9 inside; that no one should have to subject themselves to
10 discrimination as a condition of taking the bar.

11 And no one should have to subject themselves to the
12 delay. Mr. Elder is going to be the disability rights fellow
13 this year, the second one, at Brown, Goldstein & Levy. And he
14 wants to take depositions, and he wants to argue in Court. He
15 wants to do a lot of things as the disabilities rights fellow
16 that, indeed, he should be able to do.

17 But if he has to wait till next February when we have
18 a final ruling -- if we have a final ruling and we can get it up
19 to the Fourth Circuit -- and, of course, it won't be. It will
20 be 2013, 2014 when will we have this final ruling. But if he
21 has to wait, of course he's damaged. He's damaged in ways that
22 can't --

23 THE COURT: Not sure I accept your premise that it
24 will take that long. If I ruled your way after a full trial,
25 you'd have to get -- the other side would have to get a stay

1 from the Fourth Circuit to prevent the bar exam from being
2 administered to them, which I hope would not happen, if I ruled
3 your way all along.

4 MR. GOLDSTEIN: Well, perhaps --

5 THE COURT: So it may be that long, but it won't
6 definitely be that long. You can't say definitely that long.

7 MR. GOLDSTEIN: Right. And I would suggest, Your
8 Honor, that there is not a one-bite rule in the law here that
9 one has to first take and fail to have been injured. And, in
10 fact, that's not the law. Or that you must subject yourself to
11 discrimination in order to be entitled then on the second round
12 to relief.

13 Your Honor, I know the deep respect you have for
14 institutional decision-making, and deservedly so. And there
15 certainly has been a long history of contentiousness between the
16 disability community as a whole and testing agencies, whether
17 it's about flagging, whether it's about qualifying readers --
18 still an open battle -- whether it's about getting Braille
19 copies -- also still an open battle -- and that the concerns
20 that agencies have that if they give certain accommodations that
21 could affect the validity of their testing if someone got an
22 unfair advantage, for example, by getting more time than they
23 were entitled to. And those are legitimate concerns. Like
24 security.

25 But at some point, if the record is clear and clear on

1 a preliminary basis, then it is appropriate to require the
2 relief as is sought here. And I submit to Your Honor that if we
3 were to go to trial tomorrow on this record, you would be --

4 THE COURT: But you wouldn't suggest that because you
5 don't think -- you don't think I should consider summary
6 judgment, so I don't think we should be contemplating going to
7 trial on this record tomorrow.

8 MR. GOLDSTEIN: Contrary. I didn't move for summary
9 judgment because there are conflicts in the record, and --

10 THE COURT: No, but you also talk about it being an
11 undeveloped record. That's one of reasons we shouldn't even
12 proceed to summary judgment.

13 MR. GOLDSTEIN: It can always be more fully developed.
14 I'm dying to take their deposition on security, but if Your
15 Honor wanted to convert this to a final injunction, I think
16 we've got the record. Now. I do.

17 I think that on this record as you face it today, you
18 would be compelled to rule for the plaintiffs.

19 THE COURT: Thank you very much.

20 Mr. Burgoyne.

21 MR. BURGOYNE: Thank you very much, Your Honor.

22 I will start on the jurisdiction point, just to get
23 that out of the way.

24 Your Honor, given the important of subject matter
25 jurisdiction and given the extremely strong views expressed by

1 the Maryland Court of Appeals in the *Kimmer*, decision we thought
2 it appropriate to call that decision to you.

3 Obviously, it was not our lead argument. It was
4 something that we felt an obligation, just as if there was
5 precedent that was relevant to call it to your attention. We
6 certainly respect whatever ruling you have on that issue.

7 Moving on then, Your Honor, I'll start with some
8 introductory comments, and then I guess what I -- probably most
9 effective is to respond to the concerns you've identified in
10 discussions with Mr. Goldstein.

11 This is certainly an important case, Your Honor.
12 While you've got three individual plaintiffs before you and a
13 single testing organization, there can be no question that the
14 outcome of this case could well affect dozens, if not hundreds,
15 of testing organizations and certainly could extent beyond the
16 scope of individuals with disabilities.

17 Were you to hold, for example, that "best ensure"
18 requires a testing organization to get down into the weeds and
19 do what almost amounts to a psychometric analysis on how well
20 someone will perform various auxillary aids, I can guarantee you
21 that every individual seeking accommodations will take the
22 position that the accommodations they request are the only ones
23 that will best ensure that the accommodations properly address
24 their knowledge and abilities rather than their disabilities.

25 Press releases and rhetorical flourishes aside, Your

1 Honor, there are no villains in this case. As Your Honor notes
2 what NCBE has offered by way of accommodations to the state
3 boards of bar examiners on the Multistate Bar Exam are precisely
4 those accommodations which the National Federation of the Blind
5 has actively encouraged and, in fact, I think the word they used
6 is "demanded" testing organizations to provide.

7 Likewise, we're making the exam available in exactly
8 the formats that the United States Department of Justice
9 concluded in 2000 would -- in the words of the acting assistant
10 of the Department of Justice for Civil Rights -- "provide a fair
11 opportunity for individuals with visual impairments to
12 demonstrate their knowledge on standardized tests."

13 So as your Honor correctly noted, there is, in fact, a
14 history here against which our arguments are made.

15 In this particular instance, we happen to disagree
16 with the plaintiffs regarding the meaning of Section 12189 of
17 the ADA. As I tried to convey in our brief, Your Honor, what it
18 all comes down to is there are evolving technologies.

19 They would like to use those evolving technologies
20 immediately in the interest of taking the multistate bar
21 examination. Our client believes that those technologies are
22 not yet to the point where we have a sufficient comfort level
23 that we should put our secure tests in that format for
24 administration to individuals with visual impairments.

25 Conversely, we do provide that format for an exam

1 which is a nonsecure exam. To the best of my knowledge, Your
2 Honor, there is no other testing organization which makes its
3 paper-and-pencil exams available in the format that's being
4 requested by the plaintiffs in this case.

5 THE COURT: And the record doesn't reflect why after
6 the tests you all decided not to adopt, does it? I mean, it's
7 just reflects that you decided not --

8 MR. BURGOYNE: There is a declaration in the record,
9 Your Honor, from a Kent Brye, and there's a declaration from the
10 National Conference of Bar Examiners' president. And what the
11 NCBE president indicates is that while they had hoped that the
12 pilot program would indicate that you could get economies of
13 scale and that doing this in that fashion would be feasible from
14 both a cost-administrative and security perspective. When all
15 was said and done, they concluded that was not the case.

16 The security issue is still there. We have -- we
17 walked through the various scenarios from allowing an examinee
18 to put it on his or her own computer to having a state board --
19 in this case as Maryland has offered -- to purchase laptops and
20 provide it that way, to us putting it on our laptop computer.
21 The only one of those three that has given us a semblance of
22 comfort is the last one, and what we found was that it cost
23 approximately \$5,000 to administer the exam in that format,
24 would require us to devote additional resources at the staff
25 level, and also doesn't fully remove all of our security

1 concerns.

2 THE COURT: Well, what about the second option? It we
3 seem to me that the state bar examiners would have the same
4 incentive, as you all would, to provide security.

5 MR. BURGOYNE: They certainly, you would think, have
6 the same incentive, Your Honor, but we don't control the staff.
7 We don't know who they identify to come in and train people on
8 how take make sure that when the exam has been administered, it
9 doesn't get left on the laptop.

10 And I don't pretend to be an expert in computers, Your
11 Honor, but we did submit an affidavit --

12 THE COURT: It's just that you don't control the
13 situation.

14 MR. BURGOYNE: We don't control the situation is the
15 fundamental problem. And this case even has an example, Your
16 Honor. We have the manual that Mr. Goldstein relied upon so
17 heavily as, you know, somehow demonstrating that we offer the
18 exam, is a manual that we don't make available to the general
19 public because it gets into test security issues.

20 On the other hand, the Maryland Board has now made it
21 part of the public record. We don't control what third parties
22 do, and we certainly don't control what had the Maryland Board
23 does or how it decides to staff or what it does with issue to
24 materials we provide.

25 Ten years ago, Your Honor, I think it's fair to say

1 that National Conference of Bar Examiners would have been
2 congratulated, not criticized, for the manner in which it was
3 approaching the question of making accommodations to individuals
4 with visual impairments.

5 It's also true, however, Your Honor, that when the
6 Department of Justice settlement agreement was entered into and
7 when the National Federation of the Blind called upon other
8 testing organizations to administered their exams using the very
9 formats that we offer, technologies were available then as well.
10 We offered material in our brief, Your Honor, that pointed out
11 that the JAWS and ZoomText technology preceded the settlement
12 agreement and the NFB resolution.

13 So I don't think it's fair to characterize those as
14 suddenly coming on the scene after the Department of Justice
15 entered into its settlement agreement. And as Your Honor knows,
16 the Department of Justice has filed a statement of interest in
17 this case, and one of the things they say is that this
18 technology -- you know, they suggest that it wasn't around at
19 the time of the settlement agreement, but it clearly was.

20 Your Honor, whether framed in terms of accessibility,
21 appropriate auxillary aids, equal opportunity, or reasonable
22 accommodations, the outcome in this case should be the same.
23 Having done precisely what the Department of Justice and the
24 National Federation of the Blind have encouraged us to do in the
25 manner in which we deliver exams, it would be inappropriate to

1 conclude that we have violated either the letter or the spirit
2 of the Americans with Disabilities Act.

3 On that basis alone, Your Honor, we believe the Court
4 could appropriately conclude that judgment should be entered as
5 a matter of law. We pointed not only to the DOJ settlement
6 agreement, we pointed to the NFB's own statements regarding
7 appropriate formats for making the exam accessible. And, again,
8 accessibility is what the case is all about.

9 DOJ have identified -- has identified these formats as
10 formats for making the exam accessible. The National Federation
11 for the Blind has identified these formats as the suite of
12 formats that will make the exam accessible. And by
13 "accessible," both the DOJ and NFB surely meant to capture
14 within that concept the notion of equal opportunity.

15 We certainly do not suggest in any way that
16 individuals with visual impairments should not have equal
17 opportunities. What we do suggest is that in providing the
18 formats that we provide, individuals with visual impairments
19 have equal opportunity.

20 Several courts, Your Honor, in similar cases have
21 concluded as a matter of law that in this situation, summary
22 judgment is warranted. We pointed the Court's attention --

23 THE COURT: In this, plaintiffs say that what you
24 offer does not provide equal opportunity because they're used to
25 using what they're requesting.

1 MR. BURGOYNE: Well, the question -- and similar
2 claims were made in these other cases, Your Honor.

3 For example, in the *Jaramillo* case, the plaintiff said
4 he couldn't use the exam administration formats that were
5 offered on that licensing exam. What he wanted was ZoomText and
6 JAWS, the same issue here, and the Court said no reasonable jury
7 could conclude that the accommodations offered by the testing
8 organizations were not reasonable as a matter of law.

9 Likewise in the *Fink* case, the Court addressed the
10 undue burden issue and the question of whether someone's
11 entitled to their preferred accommodation and said so long as
12 the accommodations provided ensure an equal opportunity in
13 access, you're entitled to judgment as a matter of law. And
14 again, the plaintiff was not happy with the accommodations
15 offered and would have preferred others, but the Court said that
16 those that were provided are reasonable as a matter of law.

17 On the question of auxillary aids, Your Honor, we also
18 pointed to the statutory and regulatory language dealing with
19 auxillary aids. We certainly don't say that that's an
20 exhaustive list. It obviously isn't, in either the statute or
21 in the regulations. But I do think it's fair, Your Honor, to
22 say that at a minimum, if a party like the National Conference
23 of Bar Examiners provides its materials in formats which have
24 been identified as, quote, "appropriate auxillary aids," then it
25 is reasonable to say in that situation that access has been

1 provided.

2 If you do what the statute says, if you provide the
3 formats that are included on the list -- it may well be there
4 are others, but if you do what the statute says and include
5 those formats, and if you do what the regulation says and you
6 make those auxillary aids and services available, it is not
7 unreasonable to conclude that you have met your obligations
8 under the statute. It's what the Court referred to in the
9 *Dobard* case, Your Honor, as ADA-supported auxillary aids or ADA
10 identified. I'm probably missing the term, but the concept was
11 obviously if Congress and the agency had both identified these
12 sets of auxillary aids as appropriate, then you've met your
13 legal obligation in terms of providing access.

14 Your Honor correctly noted, it isn't a situation where
15 we're only offering Braille or we're only saying you can take it
16 with large print. We have, in fact, made the exam available in
17 a broad sweep of formats. And it's free for the state
18 jurisdiction to provide additional accommodations: extra
19 testing time, a scribe. Those are all things that, as the
20 entity offering the exam, the state board can do.

21 On the question of offer, Your Honor, and whether or
22 not NCBE offers this exam --

23 THE COURT: I take it the issue of overcompensation is
24 not one in which you're pursuing, the fact that if they get both
25 what they're asking, maybe they got too much time. Because you

1 didn't -- among other things, you weren't the one who determined
2 the amount of time.

3 MR. BURGOYNE: Well, precisely, Your Honor. We didn't
4 make the decision. I do think it's fair to ask why -- the
5 affidavit suggests that if the plaintiffs were allowed to take
6 the exam in their requested format, that is equivalent to the
7 manner in which a sighted individual would take the bar exam. I
8 do think it's fair to ask in that context, then, why an
9 individual would need double time. There may well be an answer,
10 but it's not --

11 THE COURT: It's not in the record.

12 MR. BURGOYNE: It's not in the record, Your Honor, but
13 I do think it raises the question as to whether, in fact, it is
14 equivalent; and what it suggests to me is -- and there could be
15 no question about this -- even taking exam on a computer, you
16 know, it's still -- a computer is reading the exam to you, not a
17 human reader. And instead of a CD reading the questions, the
18 computer is reading it. And presumably that's why they
19 requested the extra time. It is not our decision on whether any
20 extra time is given. That's made by the entity offering the
21 exam.

22 Likewise, Your Honor, I think Mr. Goldstein made the
23 point that there was record evidence from the healthcare
24 providers that extra testing time was needed. Not documents we
25 ever saw, because those documents -- that documentation isn't

1 provided to us. It's provided to the entity that reviews the
2 documentation and administers the exam.

3 On the broader question, Your Honor, of whether or not
4 NCBE offers the exam within the meaning of the statute -- and
5 this is a pure question of law, statutory construction -- I
6 think it is the correct conclusion that NCBE is not the entity
7 that offers this, nor can it be viewed as a co-offerer, which is
8 the fallback position for the plaintiffs.

9 If you look at the language of the statute, it clearly
10 focuses, as Your Honor suggested, on who's administering this
11 exam, who's making the arrangements for where it's going to be
12 administered, et cetera.

13 Likewise, if you look at the regulation which
14 implements 12189, which is 28 C.F.R. 36.309, it speaks in terms
15 of the entity offering the exam having an obligation to make
16 sure the exam is selected and administered so as to best ensure.

17 We've heard about the best ensure part of that
18 language, but you haven't heard the mention "selected and
19 administered" language. The party that selected the MBE as part
20 of their bar exam was the State Board of Bar Examiners for the
21 State of Maryland. Likewise, the entity that administers the
22 bar exam is the Maryland Board of Bar Examiners. That entity is
23 not the National Conference of Bar Examiners.

24 Mr. Goldstein also suggested that if you went to
25 Websters and Roget's, you would find support for their position

1 on a broader meaning of the word "offer." Our position, Your
2 Honor, is that the place to start is with the statute and the
3 regulation, both of which, in our view, would support the
4 conclusion that NCBE does not offer this examination.

5 THE COURT: Drawing analogies from the criminal law,
6 isn't either aiding or abetting or -- that's not a good word --
7 but in principal, aren't you, effectively, the principal behind
8 the offering of the exam?

9 MR. BURGOYNE: We are the principal behind offering an
10 exam generically to state boards of bar examiners, as we offer
11 various exams. But no given jurisdiction is obligated to
12 purchase our exam. We developed the Multistate Professional
13 Responsibility Examination. The State of Maryland has elected
14 not to purchase that exam, not to include it within the scope of
15 its bar examination.

16 We certainly make the exam available to state boards.
17 I don't think that's what the Congress was addressing, nor do I
18 think Your Honor that accepting the proposition that we don't
19 offer the MBE leaves the plaintiffs without a remedy. As you
20 suggested, there is a remedy, but it's a remedy against the
21 State Board of Bar Examiners for the State of Maryland.

22 THE COURT: As I understand your reply brief, it ends
23 up -- it doesn't end up with them taking this exam. The State
24 Board's got to say, forget the money, for you all or everybody
25 or --

1 MR. BURGOYNE: Well, there are options. This isn't --
2 the only accommodation isn't for the plaintiffs to take the
3 multistate bar examination on a computer with their requested
4 accommodation. That's correct, Your Honor.

5 The State of Maryland could say, you know, we've
6 looked at your documentation, and we think there's an
7 alternative approach here. We will waive the exam for you. Or
8 it could say we will develop our own exam to test the subjects
9 that are tested on the multistate bar exam, just as it develops
10 its own essay component.

11 None of those obviously are optimal, Your Honor, and
12 I'm sure the State of Maryland would say those aren't realistic
13 options. But they are options, Your Honor, and it doesn't leave
14 the plaintiffs without a remedy.

15 In fact, Your Honor, the State of Maryland has a
16 specific set of procedures built into their rules specifically
17 to give parties the opportunity to pursue administratively and
18 in front of the Maryland Court of Appeals concerns they have
19 about ADA accommodations. So there's a remedy there that is
20 available.

21 It isn't correct to say that accepting the proposition
22 that NCBE doesn't offer this exam leaves the plaintiff with no
23 remedy whatsoever.

24 THE COURT: Just out the curiosity, how many state bar
25 examiners buy your product, use your product?

1 MR. BURGOYNE: For the MBE, Your Honor, I think it's
2 48. A smaller number uses the MPRE. A smaller number uses the
3 multistate performance test.

4 Your Honor, to respond quickly to a few points that
5 Mr. Goldstein made. Then I'll shift over to the preliminary
6 injunction standards.

7 There was a suggestion, Your Honor, made that
8 screen-access software has been recognized by schools and
9 employers as an appropriate accommodation. What you didn't hear
10 in that sentence was that it has been recognized as an
11 appropriate accommodation by state or private entities that
12 administer secure examinations, that develop and administer
13 secure examinations. And, again, I think that's an important
14 distinction here.

15 I don't think it's fair to conclude in any sense that
16 NCBE is being arbitrary by not offering this particular
17 accommodation. It has very legitimate concerns, and this exam
18 is very different from the other exam which it makes available
19 in the electronic format.

20 There was a suggestion that we haven't offered any
21 evidence or made any claim that the accommodation that's we --
22 or the formats in which we make the exam provide equal
23 opportunity. I don't think that's a fair characterization of
24 our papers, Your Honor. And if it is, I didn't do a very good
25 job drafting my brief.

1 If we make the exam available in formats that have
2 been called for by the Department of Justice and the National
3 Federation of the Blind and many others, I don't think there's
4 any other conclusion that can be reached than that we are making
5 our exams available in a format that would provide a fair and
6 equal opportunity. It is certainly our position that by
7 providing the exam in the formats that we do, we are ensuring
8 equal opportunity within the meaning of the law for individuals
9 with visual impairments.

10 There is a suggestion that we're arguing for some
11 nebulous reasonable accommodation standard. The standard here,
12 Your Honor, is very straightforward. Do we offer the
13 examination in a manner that is accessible? We believe that we
14 do. That's the standard. That's the question for the Court,
15 the central ultimate question before the Court.

16 We have used in some of our papers the shorthand
17 "reasonable accommodations." So does the Department of Justice,
18 Your Honor, when it talks about accommodations in the testing
19 context.

20 The National Federation of the Blind when it entered
21 into a settlement agreement with the Law School Admissions
22 Council spoke in terms of "reasonable accommodations." That's
23 simply a shorthand consistent with the overarching approach of
24 the Americans with Disabilities Act.

25 It is not inappropriate for the Court to look to

1 precedent in the employment context or under Title II of the
2 ADA, which has emphasized that what the Americans with
3 Disabilities Act requires is reasonable accommodations.

4 There's nothing about the provision in the ADA that
5 deals with standardized testing, which elevates the rights of
6 examinees above the rights of all other individuals under the
7 Americans with Disabilities Act. All the provisions in that
8 statute are intended to guard against discrimination against
9 individuals with disabilities, and no category of individual is
10 entitled to greater or lesser protections under the statute.

11 The Court has noted in its own decisions, and other
12 courts have noted, that at the end of the day if reasonable
13 accommodations have been provided, the employer or the state
14 entity are entitled to judgment as a matter of law, even if the
15 accommodation they have not provided is not, quote, "ideal," is
16 not the "best," is not the "preferred accommodation."
17 Ultimately, if we have provided reasonable accommodations -- and
18 in our view on this undisputed record, we clearly have -- we
19 should be entitled to judgment.

20 I don't think, Your Honor, there was a discussion of
21 the *United States v. Morton* case. I don't find the word
22 "accessibility" particularly ambiguous. I think if you look at
23 that word in the context of the ADA as a whole and in the
24 context of all the history that has gone on in terms of making
25 standardized tests accessible to individuals who are visually

1 impaired, I think we all have a sense of what accessibility
2 means.

3 THE COURT: Mr. Goldstein says by itself it is
4 ambiguous, that you could -- somebody would have to crawl to get
5 to the exam, you know --

6 MR. BURGOYNE: I don't think we've asked -- he
7 certainly isn't suggesting that we've asked anybody to crawl to
8 get to the --

9 THE COURT: No, I understand. I know. It was just an
10 abstract interpretation.

11 MR. BURGOYNE: It was.

12 I think that if you look at what has happened, which
13 is to say that we make the exam available in multiple formats
14 which we have been told are the appropriate formats to make
15 written materials accessible to visual -- individuals with
16 visual impairments --

17 THE COURT: And I guess your position is that
18 "accessible," in context, means "reasonably accessible;" and in
19 regulation, which says "best" is inconsistent with "reasonable."

20 MR. BURGOYNE: Well, if you interpreted that -- yes,
21 if you interpret the statute as what they are urging you to do,
22 in the manner they are urging you to do, then "best ensures"
23 means far more than "accessible."

24 And I think, Your Honor, I can safely say that there
25 wasn't a lot that the California Court agreed with the National

1 Conference on in that *Enyard* case, but the one thing it did say
2 was that the plaintiffs appeared to be stretching things a bit
3 when they suggested that their reading of "best ensure" was
4 proper, given the fact that what the statute calls for is
5 "accessibility."

6 It may have been the one bright spot in the decision,
7 Your Honor.

8 THE COURT: I don't know, your bright spot wouldn't
9 appear in whether you disagreed with them or not. It was
10 appearing before the Judge. It was a very delightful thought.

11 MR. BURGOYNE: Well, I didn't have that pleasure, Your
12 Honor. I was not lead counsel in that case.

13 Your Honor, no court has interpreted the "best ensure"
14 language in the manner that they are calling for, and there have
15 been dozens -- if not over a hundred -- cases interpreting the
16 ADA's application in the testing context.

17 Your Honor, I'd also note one other thing quickly:
18 The question of whether there's any record evidence on how these
19 plaintiffs would perform via accommodations that we've offered.

20 I'm sure the Court saw this in the record, but the
21 fact is that the National Conference of Bar Examiners on the
22 exam which it does offer and as to which it does evaluate
23 accommodation requests, provided accommodations to two of
24 plaintiffs in this case on the Multistate Professional
25 Responsibility Exam, and both of them did very as well and

1 achieved scores that enabled them to pass in every jurisdiction
2 that uses the MPRE.

3 On the question of preliminary injunction, Your Honor,
4 *Winter* clearly changed the landscape in all courts, including
5 the Fourth Circuit, with its *Blackwelder* standard. And as the
6 Fourth Circuit noted in the *Obama* decision, the *Blackwelder*
7 standard was much less rigorous than what the Supreme Court has
8 called for in *Winter*.

9 Under *Winter*, there must now be a clear showing that
10 you are likely to succeed on the merits and a clear showing that
11 there would be irreparable harm in addition to the equities
12 favoring you and public interest favoring you.

13 I've already walked through why we believe as a matter
14 of law we should prevail on the merits. And certainly in the
15 face of all of that, it would be -- obviously, we don't think
16 they're likely to prevail on the merits, Your Honor. I'll leave
17 it at that.

18 On the question of irreparable harm, Your Honor,
19 they've suggested that the controlling precedent here is a
20 decision from the 1980s involving a student who was kicked out
21 of, I believe, the University of North Carolina for cheating and
22 then went in to get a preliminary injunction that would allow
23 her to continue her education.

24 As we noted in our belief, that's a very different
25 situation, as courts have noted, where somebody is already

1 underway and then comes in to get a preliminary injunction.

2 What that Court decision said, Your Honor, was that
3 having a gap in your resume that you have to explain later,
4 where professional stigma was found in the context of that case
5 to be irreparable harm. To the extent those concepts are still
6 viable in light of other Fourth Circuit decisions, Your Honor,
7 we certainly suggest here that there has been no showing of
8 actual and imminent irreparable harm by the plaintiffs.

9 We've cited two cases from the Fourth Circuit,
10 district court cases, which have held in directly analogous
11 cases that not being able to take a particular bar examination
12 does not constitute irreparable harm.

13 THE COURT: It may just be a debater's point, but
14 Mr. Goldstein is right. Certainly being subjected to a
15 discriminatory practice itself constitutes irreparable harm;
16 and, two, I'm sure when you took the bar exam, you thought
17 yourself irreparably damaged if you were being deprived of a
18 fair opportunity to pass the bar exam at all.

19 MR. BURGOYNE: I would, Your Honor, but all those
20 assume that there's been discrimination and assume that I was
21 not being given a fair opportunity. And it gets a bit circular
22 at that point if in every case where someone comes in and says,
23 I think I've been discriminated against, I need a preliminary
24 injunction, if at that point we've already established the
25 public or the -- public interest factor, as they allege, and

1 their argument is, if we sue you under the ADA, then we're
2 pursuing a civil right; and pursuing a civil right is, by
3 definition, pursuing the public interest. I don't think that
4 should be the standard, Your Honor. Otherwise, every individual
5 who files a request for preliminary injunction under the ADA and
6 other civil rights laws has, by definition, established the
7 public interest factor.

8 THE COURT: No, no. Actually, your response is very
9 interesting. One could say that if you accept that being
10 subjected to a discriminatory practice itself, ipso facto,
11 constitutes irreparable harm, that becomes an immaterial factor
12 for preliminary injunction in a civil rights case; that, in
13 fact, you only look to the success on the merits and the balance
14 of equities and public interest.

15 MR. BURGOYNE: Well, I think if I'm understanding you
16 correct, Your Honor, our view is that you can't simply accept
17 the fact that --

18 THE COURT: No, no. What I'm saying is if I thought
19 that the plaintiff was likely to succeed, that would mean that
20 he -- they were being subjected to a discriminatory practice;
21 and so, therefore, ipso facto, being subjected to that practice
22 would be -- itself constitute irreparable harm, regardless of
23 the consequences, which is not passing the bar exam.

24 MR. BURGOYNE: I think at a minimum you would have to
25 have concluded they are likely to succeed on the merits in order

1 to conclude that the public interest is served by -- the public
2 interest factor by granting a preliminary injunction. I think
3 that's what --

4 THE COURT: Well, let me ask you about the public. I
5 don't want to put an argument in without -- that it is the way
6 Mr. Goldstein, as my mind works, in sort of an institutional
7 resolution.

8 Public interest, very often, is a factor which can be
9 argued any way. You know, the plaintiffs' right is in the
10 public interest to prevent discrimination, it's you're right.
11 It's -- you know, that's not being --

12 I mean, here there is a public interest factor of
13 having institutional resolution by -- I mean, there's no reason
14 to think that your -- anybody is in any way biased, taking into
15 account fairness of others and the state of technology and that
16 it's better to have -- it's in the public interest to have a
17 institutional resolution of this, at least in the first
18 instance, as opposed to plaintiffs choosing their own method of
19 examination.

20 MR. BURGOYNE: Well, I think you're absolutely right,
21 Your Honor. There are other interests at stake, and the public
22 interest factor should be broadly construed. What we do is we
23 provide a product which has been found to be very useful to
24 state boards and to courts which are looking to have competent,
25 capable individuals assisting clients in court.

1 There is an interest at stake if we are told we have
2 to start administering our product in a way that we think raises
3 very legitimate concerns for our institution.

4 I also think, Your Honor, that you are certainly
5 right, there was an alternative vehicle for getting through
6 this, you know, other than a lawsuit. You know, we had the
7 pilot program. It may just be we don't move fast enough, you
8 know, in terms of -- or don't have the resources necessary to
9 get to that point. In all events, we found ourselves in a
10 lawsuit, Your Honor.

11 I also think it's relevant, Your Honor, that what the
12 ADA says is take a balanced approach. Again, it gets back to
13 the question of what's reasonable, and I believe that what we
14 have done is reasonable.

15 And the last question, Your Honor, of balance of the
16 equities, I think that ties in a little bit. We got into what
17 the reasons are for the National Conference, including following
18 the pilot program that these particular formats are not viable
19 at the present time. Those are certainly equities on our side
20 of the case that we think the Court should balance in the
21 preliminary injunction analysis.

22 Ultimately, though, Your Honor, I think this case
23 rises or falls on the likelihood of success on the merits and
24 the question of whether they have made a clear showing that
25 irreparable harm is likely. We don't believe either of those

1 have been made, and we certainly don't believe that this is a
2 case which justifies a mandatory preliminary injunction which,
3 as the Fourth Circuit has noted, should only be provided in the
4 most extraordinary of circumstances. We do not believe this
5 case presents such circumstances.

6 Thank you, Your Honor.

7 THE COURT: Thank you.

8 Mr. Goldstein.

9 MR. GOLDSTEIN: Your Honor, let me start by addressing
10 this institutional interest question and whether there's an
11 interest in having a predetermined menu of accommodations.

12 As I argued in my initial remarks, the Department of
13 Justice was given the responsibility to implement Title III of
14 the ADA.

15 THE COURT: I'm glad to see the Civil Rights Division,
16 in some context, isn't interested in enforcing civil rights.

17 MR. GOLDSTEIN: Well, I can tell you my experience has
18 been in the last year that they seem to be open for business
19 again, so it's been nice to see.

20 But the implementing regulation chose a different
21 approach than what you're proposing. The implementing
22 regulation, which is not that unusual when compared to the
23 similar implementing regulations elsewhere in the statute, did
24 not make an unbounded promise that people with disabilities
25 could have whatever accommodations they wanted.

1 But in addition to the fairness requirement, which is
2 very much there in terms of the results, how the results
3 reflect, they also set two other boundaries: The undue burden
4 boundary and the fundamental alteration boundary. And so as a
5 matter of law in construing regulations, if a plaintiff shows
6 the accommodation is appropriate and it is not one that is
7 unduly burdensome or fundamentally alters the nature of the
8 test, then however sound your approach might have been to the
9 regulation, the regulation provides otherwise.

10 And entitles the plaintiff to the appropriate -- the
11 accommodation if they can show the following: It will produce a
12 result that leaves them with the test reflecting their abilities
13 and not their disabilities, which means no helpful advantage
14 either. It doesn't go -- you know, it goes in both directions,
15 it's symmetrical, and unduly burden and fundamentally alter.

16 So maybe it would be better as a matter of social
17 policy for the regulation to say, each institution should have a
18 prefixed menu and decide this is what's going to be there and
19 nothing's a la cart. But that's not what the regulatory
20 language is.

21 I think it was very critical to hear from Mr. Burgoyne
22 that the MPT, the other exam that they offer -- which is not
23 repeated and, therefore, not secure -- is one that they offer in
24 electronic format and allow the bar to give. And indeed that's
25 the case. These clients, if they take the bar at the end of

1 July, will be able to take the MPT using their screen-access
2 software.

3 That's helpful because it helps put in focus that the
4 distinguishing factor is security. And we have a very clear
5 statement in the record that's not contradicted. And that is
6 Mr. Brye, who is the director of security for the National
7 Conference of Bar Examiners, in Exhibit C to the Opposition to
8 our Motion for Preliminary Injunction.

9 In describing the protocol that they developed for the
10 pilot program -- and that protocol, by the way, is all we're
11 asking for here -- said: This protocol has been tested and in
12 the view of the NCBE, is the appropriate means of sufficiently
13 protecting the security of the NBE.

14 That is a statement under oath by the head of
15 security, a very important adverb, I suggest, of "sufficiently
16 protecting the security of the NBE."

17 We've also submitted to you --

18 THE COURT: Let me ask, Mr. Burgoyne, what do you have
19 to about that?

20 MR. BURGOYNE: Your Honor, the issue's never been
21 whether it's a theoretical matter. The issue is whether as a
22 legal matter we have an obligation to do that, even in the face
23 of the administrative security and cost.

24 THE COURT: But if the concern is security and your
25 own person says it's sufficiently secure --

1 MR. BURGOYNE: Right.

2 THE COURT: -- what's the issue?

3 MR. BURGOYNE: Your Honor, that's why we developed the
4 protocol in the first place as part of pilot program. But what
5 we learned from that is that simply getting the exam to the
6 point where you have a greater sense of comfort on exam security
7 does not resolve all your concerns, Your Honor.

8 THE COURT: Okay.

9 MR. BURGOYNE: Your Honor, 90, 70 -- 80,000 people,
10 whatever the number is, in that ballpark. 70,000 people take
11 the multistate bar exam every year. Out of that number -- we
12 don't know the exact number because we don't handle
13 accommodations, we don't offer that exam, but some number, large
14 number, significant number request accommodations. If we had to
15 do for every examinee -- if suddenly --

16 THE COURT: No, I understand.

17 MR. BURGOYNE: It's just institutionally, it doesn't
18 work. We have eight IT people. If we had to start --

19 THE COURT: That's fine.

20 MR. BURGOYNE: -- loading laptop computers around the
21 country, it's not a viable option, Your Honor.

22 THE COURT: Mr. Goldstein, excuse me, I'm sorry. I
23 didn't mean to interrupt.

24 MR. GOLDSTEIN: Not at all, Your Honor. I appreciate
25 the interruption. I wish that there was some record basis for

1 what Mr. Burgoyne just said so we could deal with it.

2 It's pretty obvious that once you make one copy of an
3 electronic version off your mainframe, you can make 20 copies
4 and you can buy 20 laptops, and you can ship 20 laptops the way
5 you can ship one. And fortunately, there's no cost, because as
6 you know from the Elder -- exhibits to Mr. Elder's deposition,
7 Erica Moeser sent a memorandum after we filed this case to every
8 state bar in the country saying if we're required by a court to
9 do this, each time a state bar gives the exam in accessible
10 format, we're charging five grand to that state bar.

11 And the Maryland Board of Law Examiners has agreed to
12 pony up \$15,000 instead of using the laptops that they've got in
13 the JAWS and ZoomText software they've got. They're prepared to
14 pony up the \$15,000 which is represented in Ms. Moeser's
15 memorandum as covering the cost of doing this.

16 So from the point of view of institutional concerns
17 and the balance of equities, two things are absolutely clear on
18 this record: One, is it's not going to cost the NCBE is a penny
19 now; and, number two, they have a system which sufficiently
20 protects the security which they would follow if they did this.
21 And that was testimony under oath from them.

22 So we're trying to grapple here with fog when there's
23 simply no substance to support this concern.

24 Now, the question was raised, and I think it's a
25 legitimate question. What if the person that is hired by the

1 board of law examiners can't be trusted? Just like what if the
2 ACT, which administers the MPRE for the NCBE, should hire
3 somebody who's not qualified or, goodness gracious, hires
4 somebody who's a reader who wasn't qualified? That would be a
5 bad thing too.

6 What if they hired somebody who was bad? Well, the
7 fact is, from a security standpoint, there is no security
8 against the dishonest proctor. There is such a thing as Xerox
9 machines. There is such a thing as tape recorders. If that's
10 the problem, it doesn't matter what the security is.

11 If there's a quality issue whether it's a reader or a
12 somebody who advertently saves a copy of the file or makes a
13 photocopy, that's just a problem.

14 THE COURT: But you can understand wanting to have
15 control?

16 MR. GOLDSTEIN: Very much. Your Honor, I'm a trial
17 lawyer.

18 THE COURT: Also by definition you're a control freak.

19 MR. GOLDSTEIN: Exactly. But, as my wife would say
20 undoubtedly -- and I hope she doesn't stand up --

21 THE COURT: Counsel, we don't have to go there.

22 MR. GOLDSTEIN: -- there are limits to how much you
23 can and should control. And the same is true for the NCBE when
24 balance it again the rights of people with disabilities.

25 So it's not that I dismiss their concerns. What I'm

1 saying to you is that here they are too insubstantial in the
2 face of what else is there.

3 And moving along, the next point I wanted to make is
4 that Mr. Burgoyne pointed to *Fink* and *Jaramillo*, two cases that
5 were decided under 504. And in their reply, they point out that
6 you said that the operative language of the two statutes would
7 lead one to look to other authority.

8 The problem is the other statute you were referring to
9 was Title II of the ADA. If you compare the 43 words in Section
10 12189 to the language of 504, you will find that the words "in,"
11 "shall," "with" -- and I think there's one other preposition --
12 are in common in the two statutes. You weren't talking about
13 whether 12189 should look to 504 for authority. You were
14 talking about Title II, which reads almost verbatim like Section
15 504, the Rehabilitation Act.

16 And the thing is that *Fink* and *Jaramillo* are no
17 authority for your decision because they were decided under a
18 completely different statute.

19 The *Dobard* case -- and if I could just take a moment
20 to reach it.

21 *Dobard* -- I'm fascinated to hear them cite that in
22 argument, because *Dobard* said it was okay to provide an
23 accommodation that wasn't effective for that particular
24 plaintiff and ruled on that basis. And that probably is right
25 under Title II, but it's not right here. You, yourself, said it

1 wouldn't be right if they offered a Braille exam to someone who
2 doesn't read Braille.

3 And the problem is that we are -- for the NCBE is we
4 are under a specific statute. They talk about having to get
5 down in the weeds if they had to administer the "best ensure"
6 standard, but the fact is, Your Honor, if you look at Section --
7 42 U.S.C. Section 121127 -- excuse me, (b) (7), which is part of
8 Title I, what you see as the standard for exams for employment
9 is exactly the same language we're talking about here, except
10 that the words "best ensure" are placed with "most effective."
11 And I can't parse "best ensure" as meaning anything different
12 than "most effective."

13 Why if this is reasonable to impose on employers for
14 testing, the language is that it's discrimination to fail to
15 select and administer tests concerning employment in the most
16 effective manner to ensure that when such test is administered
17 to a job applicant or employee who has a disability that impairs
18 sensory, manual, or speaking skills, such test accurately
19 reflect the skills, aptitude, or whatever other factor of such
20 applicant or employee that such test purports to measure, rather
21 than reflecting the impaired sensory, manual, or speaking skills
22 of such employee or applicant.

23 "Most effective," "best ensured," nothing to pick with
24 there. This is an appropriate standard under the ADA. If
25 that's discrimination, than the DOJ acted appropriately in

1 making the "best ensure" standard define discrimination.

2 I am very intrigued to hear, on the one hand,
3 Mr. Burgoyne say, Well, you know, maybe it is an unfair
4 advantage to give them extra time. Why would that be a concern
5 of an entity that doesn't offer an examination? I mean --

6 THE COURT: Of course it would be. I mean, if it's
7 the one who professionally designs it. I mean, obviously he
8 didn't say -- he said they wouldn't make the decision, but I
9 would think they would be -- I think there would be a concern to
10 any fair-minded person, particularly if you're responsible for
11 creating it.

12 MR. GOLDSTEIN: Well, yes, it is -- I would agree it
13 certainly -- on the other hand, they seem perfectly comfortable
14 with the idea -- extremely offensive idea of having the bar say
15 to the blind, Well, you don't have to stay the multistate; you
16 can be a member of the bar without it. We're not really that
17 serious about the qualifications we expect our lawyers to make,
18 or We don't think you'll be a success in the law. Who knows?

19 But I was just appalled by the suggestion that, gee,
20 there's a remedy here because the state can simply waive the
21 blind taking the multistate.

22 But I agree with you that apart from any fair-minded
23 person, the folks that offer the exam that develop it, that want
24 to make sure it's fair, that want to protect its security, that
25 want to make sure that it's comparable year from year, so if

1 that means reusing questions, need to be concerned about things
2 like whether the amount of time is appropriate. And that's
3 why -- by the way, I pulled --

4 We do have for each one of these, Dr. Miller
5 explaining, for one, that testing is required time and a half
6 for doing -- taking a test with assistive technology using
7 electronic materials. And that was with respect to Michael
8 Witwer. We have the same thing for each of plaintiffs
9 explaining why. So, again, it's a question of documentation
10 versus speculation.

11 Mr. Burgoyne said that we could have pursued this with
12 the state. If you look at the state rules, we could have
13 pursued an adverse decision by the board, Maryland Board of Law
14 Examiners to the Court of Appeals -- actually to another
15 committee and then a magistrate with the Court of Appeals. If
16 only we had had an adverse decision.

17 There is no provision, sadly, when the Maryland Board
18 of Law Examiners says, We agree with you completely but we can't
19 do it. That's why we're here. I mean, pretty clear where the
20 realm of the Court of Appeals comes out on this issue, but there
21 was no road from A to B.

22 One of the other things that Mr. Burgoyne talked about
23 was effective communications, that these were effective
24 accommodations. There are two points I'd make there.

25 One is effective communications is a term that's in

1 the regulations in Title III. It's not a term in the statute.
2 It's one we all accept; it's one we all work with; it's one that
3 makes a lot of sense because the Department of Justice put it in
4 there as the way of implementing the statute.

5 But the other thing is that the record is one-sided
6 here on what's an effective communication; that is to say, you
7 have three uncontested affidavits that for these individuals, a
8 reader is not an effective accommodation; that for these three
9 individuals, Braille is not an effective accommodation, nor is
10 large print, nor is a CCTV. None of these are effective
11 accommodations, and that expert testimony is uncontradicted on
12 this record.

13 Now, with respect to the issue of irreparable harm,
14 the fact is you only get to it if you're likely to prevail on
15 the merits. And there's no question that if we're not likely to
16 prevail on the merits, you never have to consider the issue of
17 irreparable harm. But if we are likely to prevail on the
18 merits, then you look to see how likely the harm is to occur,
19 and sometimes that's tenuous.

20 But here, as a factual matter, there's not much
21 question about it. If they're forced to take the exam under
22 discriminatory conditions, which is what would happen if they
23 choose to take the exam if you deny the preliminary injunction,
24 that's certain to occur. Or having to take it later is certain
25 to occur. But it's always circular. You always first have to

1 establish you'd like to prevail on the merits because,
2 otherwise, there's not the a harm that's likely to occur.

3 And finally -- and I'm sure, you're glad to hear me
4 say the word "finally." And, Your Honor, I appreciate your
5 forbearance and the time and attention that you're giving this
6 matter.

7 But, in terms of the balance of the equities, the fact
8 that the NCBE has developed a protocol it finds sufficiently
9 protects the security, coupled with the fact that it can and
10 will recover the cost and administrative time from the Maryland
11 Bar means that the balance of equities tips entirely in favor of
12 the plaintiffs to take the exam with the appropriate
13 accommodation.

14 And, Your Honor, Mr. Burgoyne said maybe the NCBE is
15 not moving fast enough for the plaintiffs. Mr. Elder didn't
16 choose when he was going to be born and when he was going to
17 finish law school, but he has succeeded in finishing law school
18 and he is entitled now to take the exam under fair conditions.
19 And the -- if the merits are there, if it's warranted, then the
20 NCBE does not have all the time in the world.

21 They have pointed out how long screen-access software
22 has been around. I think they say it's been around 20 years.
23 Isn't that long enough to figure out whether you can do this or
24 not, and if you can't, to offer a court sound reasons?

25 Unless the Court has further questions, that would be

1 our submission. Thank you.

2 THE COURT: Thank you.

3 I'll rule, because I have to, given the time frame,
4 and I am going deny the motion for preliminary injunction.
5 Under Fourth Circuit law to consider four factors, of course,
6 the first of which is whether the party seeking preliminary
7 injunction have established that they are likely to succeed on
8 the merits; secondly, that they are likely to suffer irreparable
9 harm in the absence of preliminary relief; third, that the
10 balance of equities tip in their favor; and, four, that an
11 injunction is in the public interest.

12 I am not -- I cannot find that the plaintiffs have
13 established that they are likely to succeed on the merits. I
14 agree with them on the subject matter jurisdiction issue, as I
15 indicated earlier in the hearing, and I appreciate
16 Mr. Burgoyne's response to that.

17 And I understand it was appropriate for them to raise
18 a subject -- for the defendant to raise a subject matter
19 jurisdiction issue, but I am persuaded that the *Kimmer* case had
20 to do with allocation of responsibility within and around the
21 court system for matters relating to the bar examinations do not
22 intend to deprive a federal court if they felt that federal
23 rights were being interfered with from issuing an appropriate
24 order.

25 But there are two grounds on which I have concerns;

1 although, I am not certainly not making any final ruling on this
2 at this stage, as to whether had the plaintiffs will succeed on
3 the merits.

4 First, although it as a practice seems
5 counterintuitive and, as I said, cold, I am not persuaded that
6 the defendant offers the examinations in question within the
7 meaning of the statute. This may very well be an congressional
8 oversight, because certainly there's nothing in the statutes to
9 state that Congress would not have wanted the defendant covered.
10 But the language used is that - U.S.C. Section 12189 is that,
11 quote, "Any person that offers examinations related to licensing
12 for professional purposes shall offer such examinations or
13 courses in a place and manner accessible to persons with
14 disabilities.

15 It is the Maryland Board of Examiners which determines
16 the place and, to some extent, the manner -- although the manner
17 here is in dispute -- but the place of the examination. And
18 frankly, it seems to me, under Section 12189 is directed not to
19 the test maker but to the person who is actually giving the
20 exam, which in other contexts, in the professional
21 responsibility context, the defendant does, but that is not a
22 test here at issue.

23 I find further support for the concern about whether
24 or not the defendant is an offerer within the meaning of
25 regulations 28 C.F.R. Section 36.309 which requires, quote: Any

1 private entity offering an examination to be sure, quote, a
2 examination is selected and administered as to best ensure the
3 person's with disabilities are not a disadvantage.

4 That, to me, is not what is involved here. There is
5 not a selection or administration of this test in any way about
6 a defendant which is a private nonprofit entity.

7 Secondly, even if the defendant does offer the
8 examination within the meaning of the statute, I am not
9 persuaded on the present record that the examination is offered
10 under with the conditions that the defendant is willing to make,
11 renders the -- makes the examination inaccessible. It is not
12 inaccessible to defendants.

13 Their technical arguments about how -- what other
14 statutes you should look to and it's a little odd to incorporate
15 into a statute language, but I think in context, "accessible"
16 clearly means "reasonably accessible."

17 But in any event, I don't find the term ambiguous; so,
18 therefore, I don't think one turns to implementing regulation.
19 And, frankly, implementing regulation which talks about best
20 ensuring is, to me, inconsistent with what the statute says.
21 The statute is about making the examination accessible, which I
22 think we all would agree is reasonably accessible but that does
23 not convert into best ensure.

24 The issue of -- next the plaintiffs must establish is
25 that they would likely to be suffered irreparable harm in the

1 absence of a preliminary relief. Frankly, I am inclined to
2 agree with Mr. Goldstein that -- and if I were persuaded that
3 the plaintiffs proved likelihood of success on the merits, the
4 very fact of being subjected to an examination under
5 discriminatory conditions would constitute irreparable harm,
6 even though we don't know whether or not, as a practical matter,
7 plaintiffs would pass the test, which is maybe a potential issue
8 here, but, frankly, it's one I don't think anybody should be
9 subjected to doing something under discriminatory conditions.

10 The balance of equities and whether the injunction is
11 in the public interest seems to me the merge here. And
12 effectively, Mr. Goldstein certainly wrote excellent papers and
13 made excellent presentation, but I really do think that here the
14 plaintiffs are asking for their preferred method of taking the
15 test. I think that is what this, in the final analysis, is all
16 about.

17 They may very well be entitled to after a full record
18 is developed; but, frankly -- it may be a conservative instinct
19 on my part, but I think that having the decision as to whether
20 the test is the appropriate one should be -- is best made
21 institutionally after considering of all relevant factors by a
22 party which -- there's nothing on this record to suggest the
23 defendant is in any way biased. I think that you have various
24 competing concerns, and -- that the defendant needs to consider.
25 And, it seems to me, that that is best resolved by the

1 defendant, not by the plaintiffs choosing the way they want the
2 test administered to them, or by me saying that sounds like a
3 good idea. It does sound like a good idea to me.

4 I have no reason to doubt anything about these
5 plaintiffs. They are admirable people, and I have no real
6 reason to doubt what their experts say, but I am uncomfortable
7 in making determination, and also there is -- although, it may
8 be a minimal risk, there is a risk that -- at least enunciated
9 by the defendant -- about the security of the test. I would not
10 want to be issuing an order which could result in the whole --
11 in insecurity of the bar examination. So I'm denying the motion
12 for preliminary relief.

13 Now, I realize this is ironic when I now say this
14 because I think the defendant's position was that they're not
15 going to provide materials absent a court order, and I'm not
16 giving the court order.

17 There's nothing to stop the defendant from going back
18 and considering: This examination is coming up, the Maryland,
19 we can work out security concerns, we can -- we've had a test,
20 you know, there's a pending litigation, let's expand the test
21 and see -- let these three people take the exam with the
22 enhanced material.

23 There's nothing wrong doing voluntary that which has
24 not been ordered, even if you said I'm going to need an order.
25 I realized I'm probably whistling in the wind, but that makes

1 perfect sense to me in the context of this litigation. The
2 defendant's going to face litigation expenses. I'm denying his
3 motion to dismiss -- although I think that there's potential
4 merits to his position. As matter of litigation management, it
5 makes much more sense to consider that issue in the context of
6 the whole case. And I want a full record developed on the issue
7 of the appropriateness of the test -- excuse me, of the
8 accommodations which have been offered --

9 Excuse me, I should also say in the background, I do
10 find that the defendant has offered accommodations which are
11 historically sound, and they've been accepted by the Department
12 of Justice in other circumstances; in which, frankly, provide a
13 basis to show that it is acting in entirely reasonably to make
14 the examinations accessible to the plaintiffs.

15 That said, there's not wrong with offering a little
16 bit more in term of these tests if there really is a concern.
17 There's certainly litigation expenses faced by the defendant
18 here; there is the uncertainty of the outcome. There have been
19 tests conducted in the past about these examinations. I don't
20 know, there may be other concerns, but I certainly wouldn't want
21 the mere fact that the litigation has been brought to prevent a
22 defendant from considering law.

23 These three people, the bar examination is coming up,
24 let them take the bar examination. They're qualified people.
25 They have doctors who say they need these things. We can

1 consider, in due course, whether or not we want to expand what
2 we offer to allow the kind of things they're asking for, the
3 JAWS and the Zoom, whatever. But we don't have to make that
4 decision now, and we can make an accommodation and we can work
5 out with the bar folk ways to make this secure that we're
6 satisfy. That's my hope. I realize it is no more than a hope,
7 and it is one which is contradicted by the fact that hasn't
8 happened so far.

9 So that's my ruling. I am denying the motion for
10 preliminary injunction for the reasons I've stated. Thank you.

11 (Proceedings adjourned at 4:16 p.m.)

12
13 * * * * *

14
15 I certify that the foregoing is a correct transcript
16 from the record of proceedings in the above-entitled matter.
17 Any redaction of personal data identifiers pursuant to the
18 Judicial Conference Policy on Privacy are noted within the
19 transcript.

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Julie A. Wycoff, RPR
Official U.S. Court Reporter

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